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No. 04-163

In the Supreme Court of the United States

LINDA LINGLE, GOVERNOR OF THE STATE OF HAWAII, AND MARK J. BENNETT, ATTORNEY GENERAL OF THE STATE OF HAWAII, PETITIONERS

v.

CHEVRON USA INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

MARK B. STERN
SHARON SWINGLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a state law limiting the rent that oil refiners may charge their lessee-dealers may be held invalid under the Just Compensation Clause based on a district court's finding that the law is unlikely to achieve its consumer-protection objectives.

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INTEREST OF THE UNITED STATES

This case concerns a challenge under the Just Compensation Clause of the Fifth Amendment to a state law that limits the amount of rent that oil companies may charge lessees of company-owned service stations. The federal government administers many programs that restrict the use of private property in order to protect human health, public safety, the environment, and other important interests. The United States has a substantial interest in the sound development of the relevant constitutional analysis in cases that may affect its ability to implement those programs consistent with constitutional protections for private property.

STATEMENT

1. "Because Hawaii is a physically small and geographically remote economy, certain of its markets tend to be concentrated." Act 257 § 1(4), 1997 Haw. Sess. Laws 561, codified in part at Haw. Rev. Stat. Ann. § 486H-10.4 (Michie 1998 & Supp. 2003). The wholesale market for gasoline is one

such market. In 1997, when the law at issue in this case was enacted, only two refineries and six gasoline wholesalers were doing business in the State. See Pet. App. 35. As the Hawaii Legislature found in enacting the challenged statute, prices in highly concentrated markets tend to rise above competitive levels, resulting in harm to consumers and the public. Act 257, § 1(4)-(5), 1997 Haw. Sess. Laws 561.

Act 257 represents the Hawaii Legislature's effort to protect consumers against supracompetitive retail prices for gasoline. Although the wholesale gasoline market in Hawaii is highly concentrated, the retail gasoline market includes numerous participants, including company-operated stations, which are owned and operated by oil companies marketing their own products; lessee-dealer stations, which are leased by retail dealers from oil companies; and independent stations, which are neither owned by nor leased from oil companies. Act 257 seeks to prevent oil companies from projecting their market power as wholesale dealers into the retail gasoline market, with the ultimate aim of protecting consumers against increased gas prices. See Pet. App. 33-35, 106-108.

Act 257 contains several provisions that are intended to protect the competitive position of lessee-dealer and independent gas stations. The Act prohibits an oil company from converting a lessee-dealer service station to a company-operated station, and from opening a new company-owned service station in close proximity to an existing dealer station. See Haw. Rev. Stat. Ann. § 486H-10.4(a) and (b) (Michie 1998 & Supp. 2003). The Act also limits the amount of rent that an oil company may charge a lessee-dealer for leasing a company-owned station, and it requires a lease term of at least three years. See § 486H-10.4(c). The maximum rent is tied to the volume of and profits on retail sales: under the Act, the rent may not exceed 15% of gross sales

for products other than gasoline, plus 15% of gross profit for gasoline sales. See *ibid.*; Pet. App. 3.[1]

2. Respondent Chevron USA Inc. "is one of two gasoline refiners and one of six wholesalers in Hawaii. At the retail level, [respondent] sells most of its gasoline through company-owned stations, which are leased to independent dealers." Pet. App. 2. If Act 257 had not been enacted, respondent would charge its lessee-dealers a monthly rent calculated as "an escalating percentage of the dealer's gross margin on actual * * * gasoline sales," which at least in some instances might be greater than the 15% maximum that the Act allows. *Id.* at 2-3. Respondent has not historically been able fully to recoup its own expenses relating to dealer stations through the rents paid by lessee-dealers, but instead has "relie[d] on its supply contracts to earn a profit." *Id.* at 3. "Dealers who choose to rent a station from Chevron must as a condition of their lease agree to purchase from Chevron all the product necessary to satisfy demand at the station for Chevron gasoline." *Ibid.* The wholesale price of gasoline de-

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[1] The apparent purpose of that rent-control provision is to maximize competition in the retail gasoline market by prohibiting the imposition of exorbitant rents that might have the effect of driving lessee-dealers out of business. See Pet. 2. The Petroleum Marketing Practices Act (PMPA), 15 U.S.C. 2801 *et seq.*, limits the grounds on which gasoline franchisors may terminate or fail to renew existing franchises. See 15 U.S.C. 2802(a). A gasoline company may decline to renew an existing franchise based on the parties' failure to agree to terms of renewal (15 U.S.C. 2802(b)(3)(A)), so long as any new terms imposed by the company "are the result of determinations made by the franchisor in good faith and in the normal course of business" (15 U.S.C. 2802(b)(3)(A)(i)), and those terms are not imposed "for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for the benefit of the franchisor or otherwise preventing the renewal of the franchise relationship" (15 U.S.C. 2802(b)(3)(A)(ii)). Although that provision bars gasoline companies from imposing rent increases *for the purpose* of inducing lessee-dealers to leave the market, it does not otherwise restrict the rents the lessors may charge. Act 257, by contrast, establishes a maximum rent that is determined by a mathematical formula and that does not depend on the intent of the refiner.

livered to the dealers "is unilaterally set by Chevron" (*ibid.*) and is not regulated by Act 257.

Respondent's complaint alleged, *inter alia*, that Act 257 effected an unconstitutional taking of its property. Respondent did not allege that it would suffer exorbitant economic loss as a result of the Act's restrictions on the rents it may charge its lessee-dealers; indeed, respondent stipulated that, taking into account profits from gasoline sales, it "has earned in the past and anticipates that it will earn in the future, at the rent levels allowed by Act 257, a return that satisfies any Constitutional standards on its investment in lessee dealer stations in Hawaii." J.A. 40; see Pet. App. 38-39. Rather, respondent argued that Act 257 effected an unconstitutional taking because the Act would not actually achieve its consumer-protection objectives.

3. The district court granted respondent's motion for summary judgment on its claim under the Just Compensation Clause. Pet. App. 94-118. The court stated that, "in order to determine whether the Act effects a taking, the appropriate inquiry is whether the Act substantially advances a legitimate state interest, not merely whether the legislature rationally believed it would do so." *Id.* at 106. The court found that, although the State's ultimate objective was to protect consumers from higher retail gasoline prices, the Act could achieve that objective only if it benefitted lessee-dealers. See *id.* at 107-108. The court concluded that the Act would not protect new lessee-dealers because incumbent dealers could capture the value of the reduced rent in the form of a premium by transferring their occupancy rights to others, *id.* at 108-112, and that it would not help incumbent dealers because oil refiners could offset the rent reductions with corresponding increases in wholesale petroleum prices, *id.* at 113-117.

4. The court of appeals vacated the grant of summary judgment and remanded for trial. Pet. App. 54-93. The court held that the district court had applied the correct

legal test, and it rejected the State's contention that respondent's takings claim should be addressed under the deferential standard that applies when economic regulation is challenged under the Due Process Clause. See *id.* at 58-66. The court of appeals held, however, that summary judgment was inappropriate because genuine issues of fact existed as to whether the Act "will in fact lead to lower fuel prices." *Id.* at 76; see *id.* at 66-77. The court stated that "conflicting predictions" contained in the declarations of the parties' experts precluded an award of summary judgment, and that live testimony with cross-examination was necessary "[i]n order to determine whose predictions are more accurate." *Id.* at 72.

Judge William A. Fletcher concurred in the judgment. Pet. App. 79-93. Judge Fletcher agreed that the district court's grant of summary judgment for respondent should be reversed, but he would have remanded the case with instructions that the district court apply the same "reasonableness" standard that would govern a Due Process Clause challenge to rent-and price-control laws. See *id.* at 80-81.

5. On remand, the district court conducted a one-day trial and then entered findings of fact and conclusions of law. Pet. App. 30-53. Based on the substance of the testimony and the demeanor of the witnesses, the court found the testimony of respondent's expert that Act 257 would lead to an increase in wholesale gasoline prices to be "more persuasive" than the contrary testimony of the State's expert. *Id.* at 43. The court also found as fact that "Act 257 will not advance its stated interest of lowering consumer gasoline prices" because lessee-dealers "will pocket the savings for themselves" rather than pass those savings along to consumers. *Id.* at 44. The court "disagree[d]" with the view of the State's expert that dealer uncertainty about a variety of factors—including "future rent, future gasoline margins, and stations' sales of products other than gasoline"—would prevent lessee-dealers from capturing a premium. *Id.* at 45. The district court concluded that the Act "effects an uncon-

stitutional regulatory taking" because its "imposition of a cap on the rent that an oil company may charge a lessee-dealer does not substantially advance the State's legitimate interest in lowering gasoline prices." *Id.* at 53.

6. The court of appeals affirmed. Pet. App. 1-29. The court held that the State's challenge to the legal standard applied by the district court was barred by "law of the case" principles. *Id.* at 5-17. The court of appeals sustained the district court's application of that standard to the facts of this case, concluding that "[t]he court's factual findings and conclusions of law are consistent with the views of the parties' experts and are not clearly erroneous." *Id.* at 21. Judge Fletcher dissented, *id.* at 25-29, adhering to the view expressed in his prior opinion that the "substantially advance[]" test is inapplicable to rent-control legislation, see *id.* at 25-26.

SUMMARY OF ARGUMENT

A. In reviewing due process and equal protection attacks on federal or state economic legislation, courts apply a highly deferential standard under which the challenged law will be sustained if a reasonable legislator could believe that it will serve a legitimate public purpose. This Court has applied that deferential standard to due process and equal protection challenges to a variety of price-control laws, including those addressed to rents.

B. During the era commonly associated with *Lochner* v. *New York*, 198 U.S. 45 (1905), this Court frequently invoked the Due Process Clause and a less deferential standard of review to invalidate economic legislation. The Court subsequently repudiated those decisions as inconsistent with the limited role of the judiciary. The Court has relied on the same principles of judicial restraint in applying a highly deferential standard of review when economic legislation is challenged under the Equal Protection Clause. Those principles would be substantially undermined if plaintiffs could obtain heightened scrutiny by bringing challenges to the efficacy of routine economic regulatory legislation under the Just Compensation Clause.

C. Disputes concerning the efficacy of economic legislation have no bearing on the question whether such legislation effects a taking. The paradigmatic taking is a direct appropriation of land under the government's power of eminent domain. Compensation is required in that setting, and in other cases involving physical takings, to ensure that the costs of achieving public objectives are equitably spread throughout the community rather than unfairly concentrated on discrete property owners. The Court's regulatory takings jurisprudence reflects an effort to identify other government actions that impose such disproportionate burdens on particular regulated persons as to constitute the functional equivalent of an appropriation of property. Respondent's contention that Act 257 will fail to achieve its consumer-protection objectives does not implicate the Just Compensation Clause because the efficacy of Act 257 is logically irrelevant to the question whether respondent will bear a disproportionate share of the burdens the Act entails. Indeed, additional legislative measures to make Act 257 more efficacious might well impose greater burdens on respondent. The decisions of the courts below to enjoin the enforcement of Act 257, rather than to order the payment of just compensation, further demonstrate that their rationale for finding a taking is inconsistent with established Just Compensation Clause jurisprudence.

D. The court of appeals' approach to this case is in no way compelled by this Court's precedents. Although several of this Court's decisions contain passing references to the "substantially advance" standard, the Court has never found a taking based on doubt as to the likely efficacy of economic regulation. And, in any event, because the phrase "substantially advance" has its roots in due process jurisprudence, the Court's use of the phrase in the takings context provides

no basis for the Ninth Circuit's rejection of the "rational basis" standard in this case. Finally, cases in which the right to develop land is conditioned on the dedication of a public easement—a permanent physical occupation of real property for which the Constitution would ordinarily require the payment of just compensation—present distinct problems, and the constitutional rules that govern in that setting are inapplicable here.

ARGUMENT

IN REFUSING TO DEFER TO THE HAWAII LEGISLATURE'S DETERMINATION THAT ACT 257 WILL PRESERVE COMPETITION IN THE RETAIL GASOLINE MARKET, AND IN ORDERING A TRIAL TO ASSESS ACT 257'S LIKELY EFFICACY, THE COURT OF APPEALS MISAPPLIED THIS COURT'S PRECEDENTS AND IGNORED IMPORTANT LIMITS ON THE PROPER ROLE OF THE JUDICIAL BRANCH

In several decisions beginning with *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980), this Court has stated without elaboration that a restriction on the use of property may effect a taking if it does not "substantially advance" a legitimate governmental interest. Relying on those statements and on their Ninth Circuit progeny, the court of appeals directed the district court to conduct a trial to determine whether Act 257 would actually produce the benefits to consumers that the state legislature had anticipated. After the district court held the mandated trial and found that Act 257 would not achieve its consumer-protection objectives, the court of appeals sustained that finding as not clearly erroneous and affirmed the district court's injunction against the Act's enforcement.

The court of appeals' approach is badly mistaken for two distinct reasons. First, as we demonstrate in Parts A and B, *infra*, this Court's unwillingness to second-guess legislative judgments through evidentiary hearings, and the resulting

deferential "rational basis" standard that governs due process and equal protection challenges to economic legislation, reflect long-settled principles of judicial restraint and relative institutional competence. Those principles would be substantially undermined if heightened scrutiny of such legislation were available under the Just Compensation Clause. Second, as we explain in Part C, *infra*, Just Compensation Clause analysis *presupposes* that the relevant government action is a reasonable means of achieving some legitimate public purpose, and seeks to identify those regulatory measures that will impose such disproportionate burdens on discrete property owners as to render those measures the functional equivalent of an exercise of eminent domain. Questions concerning Act 257's likely *efficacy* are logically irrelevant to that inquiry, and indeed more efficacious regulation might well produce a greater burden.

Finally, we show in Part D, *infra*, that the court of appeals' approach is in no way compelled by this Court's precedents. The "substantially advance" test was derived from this Court's due process jurisprudence, and the Court has never invoked that test to find a taking of property based on doubt that economic or land-use regulation, in fact, would achieve its desired objectives.

A. In Reviewing Due Process And Equal Protection Challenges To Economic Legislation, Including Price-Control Laws, Courts Must Give Great Deference To The Policy And Predictive Judgments Of Legislative Officials

During the past several decades, this Court has repeatedly held that, when federal or state economic legislation is challenged under the Due Process Clause of the Fifth or Fourteenth Amendment, courts must apply a highly deferential standard under which the law will be sustained if a reasonable legislator could believe that it will serve a legitimate public purpose. "It is by now well established that leg-

islative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). A similarly deferential standard applies when such legislation is challenged under the Equal Protection Clause of the Fourteenth Amendment or the equal protection component of the Fifth Amendment. See, *e.g.*, *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488-489 (1955).

That highly deferential standard applies with full force to due process and equal protection challenges to price-control laws, including those that regulate the prevailing rent for real property. Thus, in *Nebbia* v. *New York*, 291 U.S. 502 (1934), the Court sustained a state law setting minimum and maximum prices for the retail sale of milk. See *id.* at 515, 539. The Court explained that "[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied." *Id.* at 537; see *id.* at 539 ("Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt."), quoted in *Permian Basin Area Rate Cases*, 390 U.S. 747, 769-770 (1968). In *Pennell* v. *City of San Jose*, 485 U.S. 1, 11-13 (1988), the Court recognized the continuing validity of that standard for reviewing due process challenges to price-control legislation, and it applied that standard to a municipal ordinance controlling rents. The Court in *Pennell* also

rejected the plaintiffs' equal protection challenge to the rent-control law, reviewing it only for a rational basis. See *id.* at 14-15. Thus, if respondent had pursued a Due Process or Equal Protection Clause challenge to Act 257, the court of appeals would have reviewed the Act under a highly deferential standard and could not properly have ordered a trial on the question whether the law would actually achieve its consumer-protection objectives.

B. Respondent's Request For Heightened Scrutiny Of Act 257's Achievement Of Its Goals Is Inconsistent With The Principles Of Judicial Restraint And Legislative Preeminence In Economic Affairs That Underlie This Court's Due Process And Equal Protection Jurisprudence

The important constitutional principle reflected in the decisions cited above would be substantially undermined if a plaintiff in respondent's position could obtain a more favorable standard of review of a law's efficacy simply by recasting its constitutional challenge as a takings claim.[2] Respondent seeks to escape the force of those precedents by arguing that a deferential standard of review applies in due process cases only because "[t]he Due Process Clause is directed primarily toward ensuring the adequacy of *procedural* safeguards in protecting personal interests generally." Br. in Opp. 18. That argument ignores the historical development of this Court's due process jurisprudence and the

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[2] Even assuming that Act 257 is a rational means of protecting consumer interests and therefore would satisfy due process and equal protection scrutiny, its character as a rent-control measure might still be relevant to a claim under, *e.g.*, *Penn Cent. Transp.* v. *City of New York*, 438 U.S. 104 (1978), that the Act effects a taking by imposing exorbitant *burdens* on individual property owners. See pp. 16-19, *infra*; but cf. note 5, *infra*. But respondent has not pursued such a claim, see pp. 19-20, *infra*; cf. *Pennell*, 485 U.S. at 8-11 (finding takings claim unripe), and its challenge to the *efficacy* of Act 257 should not be analyzed under any test more demanding than the rational-basis standard.

justifications that the Court has given for its highly deferential review of laws regulating economic affairs.[3]

1. During the era commonly associated with *Lochner* v. *New York*, 198 U.S. 45 (1905), this Court closely scrutinized (and frequently invalidated) legislation under the Due Process Clause. See, *e.g.*, *Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963) ("There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy."). This Court's rejection of that approach in favor of the highly deferential standard in due process cases was an epochal shift that reflected deeply held views about the proper role of courts in our system of government. See, *e.g.*, *ibid.* ("Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation."); *Nebbia*, 291 U.S. at 537 ("With the wisdom of the policy adopted [in a law regulating economic affairs], with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."). In light of this Court's own explanations for its repudiation of *Lochner* and associated decisions, it is ahistorical to suggest that the mistake made by plaintiffs and courts during the *Lochner* era was simply that they grounded their attacks in the wrong Clause of the Constitution.

[3] In addition to its potential impact on economic and land-use *legislation*, the Ninth Circuit's decision in this case has significant implications for judicial review of federal agency action. In conducting review under the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A) (authorizing court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"), a court owes substantial deference to the technical judgments of an expert agency acting pursuant to a grant of authority from Congress. See, *e.g.*, *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989) (Where "analysis of the relevant documents requires a high level of technical expertise, [courts] must defer to the informed discretion of the responsible federal agencies.") (citation and internal quotation marks omitted). If the rent-control measure at issue here had been adopted by a federal agency pursuant to congressional authorization, a court in conducting APA review could not properly hold a trial to determine whether the restriction would advance consumer interests. The court of appeals' decision here, if affirmed by this Court, would open the door to more intrusive review of agencies' technical judgments under the Just Compensation Clause than is currently available under the APA's "arbitrary and capricious" standard, in contravention of established administrative law principles. Cf. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (Federal Power Commission's rate order "is the product of expert judgment which carries a presumption of validity," so that "he who would upset the rate order under the [Natural Gas] Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."); *id.* at 607 ("Since there are no constitutional requirements more exacting than the standards of the Act, a rate order which conforms to the latter does not run afoul of the former.").

The preeminence of legislative authority in the sphere of economic policy rests in part on the fact that legislators are popularly elected and are therefore accountable to the public. See, *e.g.*, *Ferguson*, 372 U.S. at 730 ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."). It also reflects this Court's recognition that judges typically lack both the fact-gathering capabilities and the technical expertise that Congress and the state legislatures possess (or can gain access to) in their formulation of public policy. See, *e.g.*, *American Commercial Lines, Inc.* v. *Louisville & Nashville R.R.*, 392 U.S. 571, 590 (1968) ("The courts are ill-qualified indeed to make the kind of basic judgments about economic policy sought by the railroads here.").[4] Finally, where re-

[4] Even in circumstances where an Act of Congress is subject to intermediate scrutiny, as when media regulation significantly implicates First Amendment interests, see *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 185 (1997), a reviewing court "must accord substantial deference to the predictive judgments of Congress," *id.* at 195. That deference rests in part on the fact that Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Ibid.* (citation and internal quotation marks omitted). Deference is also appropriate to ensure that the reviewing court does not

view of state legislation is concerned, a deferential standard furthers principles of federalism by ensuring that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Each of the concerns described above would be directly implicated if heightened judicial scrutiny of the efficacy of state legislation were available in suits brought under the Just Compensation Clause. To allow a plaintiff in respondent's position to obtain a more favorable standard of review simply by repackaging its challenge as a Just Compensation Clause claim is inconsistent with this Court's repeated admonitions that the deferential standard of review that generally applies in due process challenges rests on fundamental principles concerning the Constitution's allocation of power between legislatures and courts.[5]

"infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." *Id.* at 196.

[5] The court of appeals did not make clear precisely what category of regulatory activities it believed should be subject to heightened scrutiny under the "substantially advance" standard—*i.e.*, whether that scrutiny applies to economic regulation generally, or only to regulation that has a particular connection to the use of real property. If the Ninth Circuit's decision is given the broader reading, it would suggest (for example) that a district court could conduct a trial to assess the Sherman Act's likely efficacy if a plaintiff alleges (as some scholars believe, see, *e.g.*, Richard A. Epstein, *Simple Rules for a Complex World* 126-127 (1995)) that the Act disserves the interests of consumers and therefore does not "substantially advance" a legitimate governmental objective. It is hard to imagine that the court of appeals intended to endorse that result. But because the Just Compensation Clause prohibits uncompensated takings of private *property*, not simply uncompensated takings of *land*, the text of the Clause does not furnish a ready basis to differentiate for these purposes between regulation of the rent that respondent charges its lessee-dealers and (hypothetical) regulation of the price it charges for wholesale deliveries of gasoline. Cf. note 3, *supra*, and note 7, *infra*; but cf. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1027-1028 (1992). Such a distinction also appears inconsistent with this Court's holdings that, for due

2. This Court also applies a highly deferential standard when challenges to state and federal regulations that do not implicate fundamental rights or suspect classes are brought under the Equal Protection Clause. See, *e.g.*, *Beach Communications*, 508 U.S. at 313 (equal protection challenge to such regulation fails "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"); see also *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564-565 (2000) (equal protection challenge to regulation of residential property). As in its decisions applying the Due Process Clause, the Court has justified that approach by emphasizing the limited role of courts in a democratic society. See, *e.g.*, *id.* at 314 (deferential standard in equal protection cases "is a paradigm of judicial restraint"); *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.") (footnote omitted). The Court's application of that standard to equal protection challenges, and its invocation of the same principles of judicial restraint that animate its substantive due process jurisprudence, further undermine respondent's contention that the deferential review conducted in Due Process Clause cases rests on the procedural focus of that Clause.

C. Disputes Concerning The Likely Efficacy Of Economic Regulation Are Irrelevant To The Just Compensation Clause Inquiry

Respondent suggests (Br. in Opp. 18) that heightened scrutiny of Act 257 is appropriate because the Just Compensation Clause is the constitutional provision whose purposes

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process and equal protection purposes, rent-control laws should be reviewed under the same deferential "rational basis" standard that applies to other economic legislation. See pp. 10-11, *supra*.

are most directly implicated by challenges to allegedly ineffective economic regulation. That contention reflects a fundamental misunderstanding of the just compensation requirement and of this Court's regulatory takings jurisprudence. Far from lying at the core of the Just Compensation Clause inquiry, disputes concerning the likely efficacy of economic regulation are *irrelevant* to the question whether such regulation effects a taking.

1. As this Court recognized in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992), "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." Rather, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Id.* at 1014 (citations omitted). The requirement that just compensation be paid when the government appropriates real property does not rest on the proposition that appropriation of land is an ineffective means of advancing legitimate governmental objectives. To the contrary, payment of compensation when the government exercises the power of eminent domain presupposes that the government could rationally conclude that the appropriation would serve such objectives, and would therefore satisfy the "public use" precondition for a taking. See p. 21 & note 10, *infra*. The mandate that just compensation be paid instead ensures that the costs of achieving the government's objectives are equitably spread across the community, rather than being unfairly concentrated on the discrete individuals who own the particular tracts that the government has concluded should be obtained to carry out its program. See, *e.g.*, *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960) (just compensation requirement "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

2. Since the early 20th Century, this Court has held that land-use regulation may sometimes intrude so severely upon the prerogatives that have traditionally accompanied ownership of real property that it should be treated as a compensable taking, even though the owner retains title to and possession of the land, and even if no physical intrusion onto the property occurs. See, *e.g.*, *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 n.17 (2002) (regulatory taking occurs when "a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation"); *Lucas*, 505 U.S. at 1014-1019; *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922). Thus, regulation that deprives the owner of all economically beneficial use of the land requires the payment of just compensation unless the proscribed uses are reasonably regarded as not part of the property to begin with (due, for example, to background principles of nuisance law). See *Lucas*, 505 U.S. at 1014-1016, 1027, 1029.

The core justification for requiring the payment of compensation in that situation is that, when regulation renders a parcel of real property essentially valueless, its practical impact on the landowner is the functional equivalent of a condemnation. In *Mahon*, for example, a state law essentially eliminated a coal company's separate "support estate" in the land that it had acquired to allow it to mine coal. See 260 U.S. at 414-415. The Court explained that in those circumstances, "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414; see *Lucas*, 505 U.S. at 1017 (noting that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."). "The principle that underlies this doctrine is that, while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of the advantage of living and doing business in a civi-

lized community, some are so substantial and unforeseeable, and can so easily be identified and redistributed, that justice and fairness require that they be borne by the public as a whole." *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 14 (1984) (footnote and internal quotation marks omitted).

As when regulation renders a parcel of land valueless, just compensation must also be paid when the government requires a landowner to accept a permanent physical occupation of his real property. See *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 831-832 (1987); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 434-435, 441 (1982). That rule likewise rests on the Court's recognition that a permanent physical occupation places a particularly severe burden upon the landowner. See *id.* at 435 (explaining that "a permanent physical occupation of another's property * * * is perhaps the most serious form of invasion of an owner's property interests" because "it effectively destroys *each* of [the] rights" associated with ownership). The more ad hoc multi-factor approach described in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), is similarly designed to "determin[e] when justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* at 124 (internal quotation marks omitted); see *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 617-618 (2001).[6]

[6] Cf. *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 537 (1998) (plurality opinion) (concluding that monetary assessment imposed on current mine operators by the Coal Act effected a taking because the Act "single[d] out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused"). Five Justices in *Eastern Enterprises* concluded that the plaintiff's challenge to the Coal Act assessment was more appropriately considered under the Due Process Clause. See *id.* at 539-547 (Kennedy, J., concurring); *id.* at 554-558 (Breyer, J., dissenting). Unlike respondent's challenge to Act 257,

Thus, the various tests employed by this Court to determine whether land-use regulation "goes too far," *Mahon*, 260 U.S. at 415, and therefore should be treated as a compensable taking, reflect a common objective. Each test represents a means of identifying those regulatory measures that are analogous to the exercise of eminent domain—*i.e.*, those regulatory measures whose *burdens* are unfairly concentrated on discrete property owners. Respondent does not contend that Act 257 will render any parcel of land valueless, and indeed has acknowledged that it cannot establish a taking based on anticipated economic harm. See J.A. 40 (respondent stipulates that it "has earned in the past and anticipates that it will earn in the future, at the rent levels allowed by Act 257, a return that satisfies any Constitutional standards on its investment in lessee dealer stations in Hawaii").[7] This Court has squarely held that

however, which is grounded in the alleged inefficacy of the law, the constitutional claim in *Eastern Enterprises* at least implicated the Just Compensation Clause's central purpose of ensuring that the costs of public programs are distributed in an equitable manner. See *id.* at 537 (plurality opinion) (Coal Act assessment "implicates fundamental principles of fairness underlying the Takings Clause"); cf. *Pennell*, 485 U.S. at 20-22 (Scalia, J., concurring in part and dissenting in part). Thus, even under the approach of the *Eastern Enterprises* plurality, see 524 U.S. at 522-537, respondent's efficacy challenge does not state a valid takings claim.

[7] If respondent had based its takings claim on Act 257's anticipated economic impact, a court in reviewing that challenge would have been required to consider respondent's potential earnings from gasoline sales to lessee-dealers as well as its rental income. See *West Ohio Gas Co.* v. *Public Utils. Comm'n*, 294 U.S. 63, 70 (1935) (Under the Due Process Clause, the Court's sole "inquiry in rate cases coming here from the state courts is whether the action of the state officials in the totality of its consequences is consistent with the enjoyment by the regulated utility of a revenue something higher than the line of confiscation."). See also *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 310 (1989) (Court acknowledged in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), that "all of the subsidiary aspects of valuation for ratemaking purposes could not properly be characterized as having a constitutional dimension, despite the fact that they might affect property rights to some degree."). The approach adopted by the Ninth Circuit improperly allows a party

rent-control laws do not effect a compelled physical occupation of land, see *Yee* v. *City of Escondido*, 503 U.S. 519, 530-531 (1992), and respondent has not pursued a claim under *Penn Central*.[8] Respondent has thus failed to establish a taking under *any* of the tests employed by this Court to determine whether the *burdens* imposed by government action are so severe and disproportionate as to require the payment of just compensation.

Respondent has instead argued, and the court of appeals agreed, that Act 257 effects a taking because the law will not "substantially advance" the State's legitimate interest in preventing increases in retail gasoline prices. The contention that Act 257 will fail to achieve its consumer-protection objectives, however, is logically irrelevant to the question whether respondent has been forced to bear a disproportionate share of the financial burdens the Act entails. Indeed, any effort by the Hawaii Legislature to make Act 257 more efficacious, by, for example, imposing parallel limits on the wholesale price of gasoline, would only impose greater burdens on respondent.

The district court's finding that Act 257 is likely to be inefficacious therefore does not remotely suggest that the Act is the functional equivalent of an exercise of eminent domain.

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challenging a rate- or price-control regime to avoid the requirement of showing that the overall impact is confiscatory, and instead to pick off subsidiary elements on the ground that they are inefficacious. Allowing such a claim is particularly anomalous in this case because at least one of the concerns about Act 257's efficacy stems from the Legislature's failure to limit respondent's wholesale prices, in addition to its rents.

[8] Because respondent has not alleged a taking under the *Penn Central* test, there is no occasion in this case to consider whether the nature or strength of the government's interests may properly be taken into account in applying the factors under that test—*e.g.*, in determining the "character of the governmental action" or the extent to which it interferes with "distinct investment-backed expectations." See 437 U.S. at 124. Cf. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 485-497 (1987) (discussing *Penn Central* factors in rejecting facial takings challenge to state-law restrictions on the mining of coal).

And, absent some reasonable basis for regarding Act 257 as analogous to an appropriation of property, neither the text and purposes of the Just Compensation Clause, nor the stated rationale for this Court's regulatory takings jurisprudence, supports the conclusion that the Act effects a taking.[9]

In another respect as well, the court of appeals' disposition of this case is in tension with established Just Compensation Clause principles. "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use." *Mahon*, 260 U.S. at 415.[10] The Just Compensa-

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[9] For the reasons stated at pp. 17-21, *supra*, even economic regulation that is so patently inefficacious as to violate the Due Process Clause is not properly regarded as a "taking" of property. As a practical matter, the government's interests would be largely protected if truly irrational economic regulation were treated as both a due process violation *and* a taking, so long as the deferential "rational basis" standard applied to both sorts of constitutional claims. The decision whether to treat such regulatory measures as takings is not wholly without practical significance, however, in light of this Court's holding that the Fifth Amendment itself requires the payment of just compensation for a temporary regulatory taking. See *First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304, 318-321 (1987). By contrast, nothing in the Constitution requires the government to provide monetary relief for victims of due process or equal protection violations. See *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976).

[10] See U.S. Const. Amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation."). Nonetheless, the Court has recognized that a particular exercise of the power of eminent domain "may not be successful in achieving its intended goals." *Hawaii Hous. Auth.* v. *Midkiff*, 467 U.S. 229, 242 (1984). The Court in *Midkiff* emphasized that "whether in fact the [government action] will accomplish its objectives is not the question: the constitutional requirement is satisfied if the state Legislature rationally could have believed that the [action] would promote its objective." *Ibid.* (citation, italics, brackets, and ellipses omitted); see *id.* at 242-243. Thus, the anomalous effect of the court of appeals' application of an independent "substantially advance" test for determining whether regulatory action constitutes a "taking" is to impose more rigorous judicial scrutiny under the Just Compensation Clause when the government does *not* exercise its eminent domain power than when it does. See Pet. App. 59-60. The same "public use" prerequisite to a lawful taking of property applies in the regulatory taking context as well, see

tion Clause thus "does not prohibit the taking of private property, but instead places a condition on the exercise of that power. * * * [I]t is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304, 314-315 (1987). For that reason, "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984) (footnote omitted).[11]

Notwithstanding those established principles, the courts below treated the determination that Act 257 effected a taking as a basis for declaring the Act to be unconstitutional and enjoining its enforcement. That disposition was certainly understandable: because the district court found that Act 257 would not substantially advance any public interest, and the court of appeals sustained that finding as not clearly erroneous, invalidation of the law plainly is a more apt remedy than a directive that money be paid from the public fisc. But the courts' perception that invalidation rather than compensation was the appropriate remedy itself

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Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986, 1014 (1984), and indeed the "public use" requirement would be a proper basis under the Just Compensation Clause for any examination parallel to that under the Due Process Clause of whether the governmental action could rationally be expected to advance a legitimate public purpose.

[11] Injunctive or declaratory relief may be appropriate in takings cases if the practical availability of just compensation is doubtful, see *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978), or if the legislature has explicitly or by implication made a compensation remedy unavailable, see *Preseault* v. *ICC*, 494 U.S. 1, 12 (1990); *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 520-521 (1998) (plurality opinion). But the court of appeals did not suggest that either of those circumstances is present in the instant case.

strongly suggests that respondent's constitutional challenge sounds in due process—or perhaps in the separate requirement in the Just Compensation Clause that any taking be for a "public use" (see note 10, *supra*)—and does not implicate the purposes of the Just Compensation Clause of identifying what governmental action does constitute a taking and ensuring the payment of compensation for it. After all, when a court concludes that a statute imposes constitutionally disproportionate burdens on affected property owners, just compensation from general revenues is a perfectly tailored remedy. When the court finds a law inefficacious, just compensation is a non sequitur.

D. This Court's Decisions Do Not Support The Court Of Appeals' Determination That Act 257 Should Be Reviewed Under A Standard More Demanding Than The Rational-Basis Standard

In *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980), this Court stated that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104, 138 n.36 (1978)." In several decisions since *Agins*, this Court has quoted the "substantially advance" formulation in describing the bases on which a landowner may establish the existence of a compensable taking.[12] Taken as a whole, however, this Court's precedents do not support respondent's Fifth Amendment challenge to Act 257.

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[12] See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan*, 483 U.S. at 834 & n.3, 841; *Yee*, 503 U.S. at 534; *Lucas*, 505 U.S. at 1016; *Dolan*, 512 U.S. at 385; *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999); *Tahoe-Sierra*, 535 U.S. at 334.

1. Although this Court has frequently used the phrase "substantially advance" in describing the standards that govern regulatory takings cases, its references to that formulation generally have been brief, perfunctory, and either not seriously at issue or irrelevant to the ultimate disposition of the pertinent cases.[13] The Court has never found a taking based on doubt that an economic or land-use regulation would actually achieve its intended objective. Nor has the Court ever engaged in extended consideration of the efficacy of a challenged regulation in order to determine whether it worked a taking. The Court's prior statements that regulation may be deemed a taking if it does not "substantially advance" a legitimate government interest are therefore properly treated as dicta.[14]

2. As authority for the "substantially advance" standard, the Court in *Agins* cited *Nectow* v. *City of Cambridge*, 277 U.S. 183, 188 (1928); and the Court illustrated the application of the constitutional standard by discussing its "seminal decision" in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (*Euclid*). See *Agins*, 447 U.S. at 260, 261. The Court in *Nectow* stated that a restriction on private development adopted as part of a municipal zoning plan generally "cannot be imposed if it does not bear a substantial

[13] Of the cases cited in note 12, *supra*, *Nollan* and *Dolan* are the only two decisions in which the Court's takings analysis focused on the relationship between the relevant governmental objectives and the means used to attain those ends. Those cases, which involved distinct issues associated with exactions and permanent physical occupations of land (issues not presented here), are discussed at pp. 26-29, *infra*.

[14] In *Agins* itself, the Court concluded that the challenged zoning ordinances *did* "substantially advance legitimate governmental goals," 447 U.S. at 261, and it held that no taking had occurred, *id.* at 263. Significantly, however, the landowners in *Agins* did not contend that the challenged zoning restriction failed to advance a legitimate state interest. See Br. for Appellants at 17 n.5, *Agins*, *supra* (No. 79-602) ("[T]hat the City of Tiburon may take private property for public use, and that open space is one species of such legislatively declared public use, cannot be the subject of rational debate in the case at bench.").

relation to the public health, safety, morals, or general welfare." 277 U.S. at 188 (citing *Euclid*). The plaintiff in *Nectow* did not invoke the Just Compensation Clause, however, but instead contended that the zoning regime "deprived him of his property without due process of law in contravention of the Fourteenth Amendment." *Id.* at 185; accord *Euclid*, 272 U.S. at 384. In rejecting that claim, the *Nectow* Court observed that

> a court should not set aside the determination of public officers in such a matter unless it is clear that their action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."

Id. at 187-188 (quoting *Euclid*, 272 U.S. at 395).

Because the *Agins* Court relied on *Nectow* as authority for the "substantially advance" standard, and *Nectow* (like *Euclid*) used the phrase "substantial relation" in contradistinction to "a mere arbitrary or irrational exercise of power," *Agins* should not be read to have approved a means-ends inquiry under the Just Compensation Clause that is more demanding than rational-basis review. Read in its proper context, and considering the Court's reliance on *Nectow* and *Euclid*, the relevant sentence in *Agins* could be read to use the term "taking" in a generic sense that includes a "deprivation" of property in violation of the Due Process Clause. Cf., *e.g.*, *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 740 (1970) (describing plaintiffs' constitutional challenge as a contention that the disputed regulatory action "violates the Fifth Amendment because it constitutes a taking without due process of law"). At most, the pertinent sentence in *Agins* simply suggests that, when land-use regulation is so clearly inefficacious as to constitute a violation of substan-

tive due process principles, it also effects a taking of property.[15]

That proposition should be rejected for the reasons stated at pages 16-21 & note 9, *supra*. Because a determination that particular regulation is ineffective has no bearing on whether its attendant burdens have been unduly concentrated on particular property owners, such a determination provides no basis for treating the regulation as the functional equivalent of an exercise of eminent domain. But even if wholly inefficacious economic or land-use regulation is deemed to be a taking as well as a due process violation, there is no warrant for the Ninth Circuit's decision to engage in a *more demanding* means-ends inquiry under the Just Compensation Clause than would be appropriate in a due process or equal protection case. See pp. 11-15, *supra*.

3. In *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), the Court addressed the distinct question of what standard governs when the grant of a development permit is made contingent on the permittee's willingness to cede a public right-of-way across his land. The Court held that such an exaction may be imposed without effecting a compensable taking if, but only if, "the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. The Court explained in *Nollan* that the government may condition approval for development on exactions reasonably tailored to redress the problems (*e.g.*,

[15] The amicus brief for the United States in *Agins* stated (at 8) that "a land use regulation such as a zoning ordinance is not deemed a taking without just compensation under the Fifth Amendment where the regulation is not 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare' (*Euclid* v. *Ambler Realty Co.*, *supra*, 272 U.S. at 395) and does not deprive the owner of every reasonable beneficial use of his property." The brief further stated (at 15 n.6) that the inquiry into whether the ordinance would serve a legitimate public purpose "may also be regarded as a substantive economic due process test."

visual clutter or traffic congestion) that are caused by the development itself, but that the power to grant or withhold a permit may not legitimately be used as leverage to coerce an exaction that is intended to serve unrelated government interests. See *Nollan*, 483 U.S. at 837 ("[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion.") (citation and internal quotation marks omitted). The Court in *Dolan* further clarified that nexus requirement, framing the applicable standard as whether a "rough proportionality" exists between the required dedication of property and the anticipated impacts of the proposed development. See *Dolan*, 512 U.S. at 391. Although the Court made clear that "[n]o precise mathematical calculation is required," its analysis indicates that the "rough proportionality" standard is intended to be somewhat more demanding than rational-basis review under the Equal Protection Clause. See *ibid.*

Nollan and *Dolan* do not support the court of appeals' decision to apply heightened scrutiny in reviewing the rent restrictions imposed by Act 257. As the Court made clear in *City of Monterey*, *Dolan*'s "rough proportionality" standard is limited to "the special context of exactions," 526 U.S. at 702, and does not apply to regulatory takings claims generally, see *id.* at 703. The Court's concern in *Nollan* and *Dolan* was not that the challenged government conduct was unlikely to further any legitimate public interest. To the contrary, the challenged permit conditions appear to have been an efficacious—perhaps, too efficacious—means of achieving the relevant governmental objective. Rather, the issue in those cases was whether (and under what circumstances) a compelled dedication of an easement across real property—a permanent physical occupation that would have been a *per se* taking if imposed directly outside the permitting process—could nonetheless be imposed as a condition for a development permit. See *Nollan*, 483 U.S. at 834. Because the

governmental bodies in *Nollan* and *Dolan* sought to use the landowners' planned development activities to justify uncompensated exactions that would otherwise have violated the Constitution, the Court required a heightened showing, not simply that the permit conditions would advance *some* state interest, but that they would alleviate germane problems, *i.e.*, problems caused by the permitted development activities themselves.

The nexus requirement announced in *Nollan* and refined in *Dolan* is consistent with the legal rules that generally apply when a government benefit is conditioned on the recipient's willingness to forgo the exercise of a constitutional right. See *Dolan*, 512 U.S. at 385, 391 (invoking the "well-settled doctrine of 'unconstitutional conditions'" in support of the requirement that a meaningful nexus must exist between the required dedication and the impacts of the proposed development); see generally, *e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1458-1468 (1989) (when the provision of a government benefit is conditioned on the recipient's surrender of a constitutional right, the constitutionality of the condition depends substantially on whether the condition serves the same purpose as would an outright denial of the benefit); Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Colum. L. Rev. 321, 350-352 (1935) (same). The purpose of that nexus requirement is not to protect the public against foolhardy or inefficacious economic regulation. Rather, the requirement is intended to prevent the government from coercing dedications of property through the use of permit conditions, thereby evading the duty to pay compensation that a permanent physical occupation of land would otherwise entail. See *Nollan*, 483 U.S. at 841 ("[W]here the actual conveyance of property is made a condition to the lifting of a land-use restriction, * * * there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.").

The instant case does not implicate that concern, since Act 257 involves direct regulation of economic transactions between private parties and contains no mechanism by which the State can require dedication of private property to use by the public. There is nothing anomalous in recognizing that the government's attempt to acquire a public easement across real property without compensating the owner—a mode of land-use regulation that the Fifth Amendment would ordinarily forbid—is subject to closer judicial scrutiny than is the sort of rent-control legislation at issue here, which has long been treated as presumptively valid. See pp. 10-11, *supra*. And, to the extent that *Nollan* and *Dolan* may be ambiguous, they should be construed in a manner that avoids needless tension with the large body of precedent emphasizing the importance of judicial deference to legislative judgments in the economic sphere. See Frank Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600, 1608-1609 (1988) (To interpret *Nollan* as limited to government-imposed permanent occupations of property "fully explain[s] the opinion and its result without, implausibly, turning *Nollan* into *Lochner redivivus*.").

4. Finally, stare decisis considerations do not weigh solely or even primarily on respondent's side of this case. Disavowal of the "substantially advance" formulation as an independent standard for finding a taking would involve the repudiation of language in several of this Court's decisions. Rejection of those statements, however, would not cast doubt upon the *outcome* of any of the Court's prior cases; it would not undermine any genuine reliance interests; and it would be consistent with the broader principles of law, developed by this Court over a period of several decades, that govern constitutional challenges to economic legislation generally and regulatory takings claims in particular.

The legal standard articulated and applied by the court of appeals, by contrast, cannot be reconciled with established rules of legislative preeminence in the realm of economic affairs. Respondent's argument is also inconsistent with this Court's recognition that the distinguishing feature of a "regulatory taking" is that it subjects discrete property owners to disproportionate burdens analogous to those imposed by an exercise of eminent domain. The court of appeals departed substantially from those principles by treating the Just Compensation Clause as a ground for enjoining enforcement of Act 257, based on the purported inefficacy of the Act and without regard to any burdens it may have imposed upon respondent. This Court's endorsement of that approach would disrupt the existing legal regime far more significantly than would a repudiation of the "substantially advance" dicta.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
MARK B. STERN
SHARON SWINGLE
Attorneys

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